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Supreme Court, U.S.
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No. 95-1727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CAJUN ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

CENTRAL LOUISIANA ELECTRIC COMPANY, INC.,
UNITED STATES OF AMERICA ON BEHALF OF
RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE,
AND TECHE ELECTRIC COOPERATIVE, INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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In April 1996, Cajun Electric Power Cooperative, Inc., Petitioner ("Cajun"), filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition"), in this case, Case No. 95-1727. In response to Cajun's Petition, the United States, on behalf of the Rural Utilities Service, Department of Agriculture, filed a brief in opposition (the "United States' Brief"), and a joint response was filed by Central Louisiana Electric Company, Inc. and Teche Electric Cooperative, Inc. ("CLECO's Brief"). (The United States' Brief and CLECO's Brief hereinafter will be referred to collectively as the "Briefs in Opposition.") The Briefs in Opposition share several important errors that Cajun now brings before this Court. Both Briefs in Opposition erroneously suggest that the lower courts' decisions should be affirmed under the abuse of discretion standard, even though issues of law are reviewable *de novo*, and some of the factors relied upon below were erroneous as a matter of law. The Briefs in Opposition also incorrectly state that Cajun has not contested the appointment of a Trustee under 11 U.S.C. § 1104(a)(2), and that the decision can be affirmed on the alternative ground of § 1104(a)(2).

The Briefs in Opposition argue that even if the lower courts improperly relied on Cajun's inherent conflicts in appointing a trustee, there are sufficient independent factual grounds to justify the lower courts' decisions on an abuse of discretion standard. *See* United States' Brief at 7-8, CLECO's Brief at 6-9. This argument is incorrect for two reasons. First, it incorrectly applies an abuse of discretion standard to issues of law, which are reviewable *de novo*. Second, even if the decision is reviewable only for abuse of discretion, a legal error is *per se* an abuse of discretion.

The Briefs in Opposition assume that the standard of review in this case is purely for abuse of discretion. This is incorrect, because the statutory construction of 11 U.S.C.

§ 1104(a)(1)[1] and the definition of "similar cause" under § 1104(a)(1) are issues of law reviewable *de novo* by this Court. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Thus, it is an issue of law whether "similar cause" for appointment of a trustee under § 1104(a)(1) requires "bad acts" on the part of the debtor's management, similar to "fraud, dishonesty, incompetence, or gross mismanagement." It is also an issue of law whether inherent conflicts that arise from Cajun's cooperative structure, a structure that Congress encouraged it to adopt, can constitute "similar cause" for appointment of a trustee. By contrast, the District Court's findings of fact are reviewable for clear error, and the Court's application of the legal standard of § 1104(a)(1) to the facts is reviewable for abuse of discretion. *Id.* The Briefs in Opposition confuse the legal issue of defining "similar cause" under § 1104(a)(1), which is reviewable *de novo*, with the application of this legal standard to the facts, which is reviewable for abuse of discretion.

Second, even if the lower courts were correct in reviewing the appointment of a trustee for abuse of discretion, errors of law are not protected by the abuse of discretion standard. "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 64 U.S.L.W. 4512, 1996 WL 315800, slip op. at *13 (June 13, 1996); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). The finding of "cause" by the District Court and the Court of Appeals is based at least partially on inherent conflicts related to Cajun's status as an electric cooperative, including the existence and nature of the all requirements contracts and disputes regarding the rates charged by Cajun to its members. *See* Pet. App. at 13a (incorporating footnote 13 of original panel opinion summarizing District Court's discussion of factors supporting finding of cause for appointment of a trustee); Pet. App. at 19a (listing factors supporting finding of cause for appointing trustee, including "the

[1] 11 U.S.C. § 1104(a)(1) provides in pertinent part that the bankruptcy court may appoint a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement. . . or similar cause."

manner in which the All-Requirements Contracts between Cajun and its members operate" and disputes related to the rates Cajun charges to its members). These factors are inherent in Cajun's structure as a rural electricity cooperative, a business structure which Congress encouraged it to assume; therefore, the lower courts erred as a matter of law in finding that they provide cause for the appointment of a trustee. Because the lower courts' findings of cause rested at least in part on these impermissible considerations, their decisions are not protected by the abuse of discretion standard.

The Briefs in Opposition ignore the fact that the lower courts relied at least in part upon these impermissible factors, thereby suggesting that the decision to appoint a trustee was based only on considerations unrelated to Cajun's cooperative structure. *See* United States' Brief at 3-5 (omitting from summary of lower courts' findings that the existence and nature of all requirement contracts was a factor in finding cause for appointment of a trustee); CLECO's Brief at 7 (quoting District Court's enumeration of factors providing cause for appointment of trustee, but omitting District Court's reference to the all requirements contracts). The lower courts found cause to appoint a trustee when Cajun's inherent conflicts are considered; this is not equivalent to finding cause when the inherent conflicts are excluded from consideration. *See* CLECO's Brief at 10 (arguing that because some of the factors considered by the lower courts were appropriate, the inclusion of some inappropriate factors is irrelevant). The refusal of the Briefs in Opposition to admit that the lower courts relied at least in part on Cajun's inherent conflicts, and the selective quotation of passages from the lower courts' opinions to omit these references, does not change the reality that in finding cause to appoint a trustee the lower courts relied at least in part on Cajun's inherent conflicts. Because the lower courts committed legal error by considering improper factors in finding cause to appoint a trustee, this case should be remanded for further consideration as to whether cause remains after these factors are eliminated.

The Briefs in Opposition also state that the Fifth Circuit relied on § 1104(a)(2) in affirming the appointment of a trustee, CLECO's Brief at 5 n.3, and that Cajun has not challenged this holding, United States' Brief at 7 n.4. Both of these statements are incorrect and misleading.

CLECO's statement that the Fifth Circuit actually relied upon § 1104(a)(2) does not comport with a good-faith reading of the Fifth Circuit's opinion. Judge Emilio M. Garza's dissent, which was later incorporated as the majority opinion, does not mention or refer to subsection (a)(2). Pet. App. at 13a-14a. Indeed, the only mention of § 1104(a)(2) in either of the Fifth Circuit's opinions was the holding in the Court's original opinion, later withdrawn, that there were *not* grounds for appointment of a trustee under § 1104(a)(2). Pet. App. at 12a. The District Court did rely upon § 1104(a)(2) as alternative grounds to justify the appointment of a trustee, but the Fifth Circuit did not.

The position of the United States that Cajun has not challenged the appointment of a trustee on the alternative grounds of § 1104(a)(2) also lacks merit. Unlike CLECO, the United States does not claim that the Fifth Circuit silently relied upon subsection (a)(2) in affirming the District Court. Instead, the United States argues: (i) that Cajun has not contested the appointment of a trustee under § 1104(a)(2), and (ii) that § 1104(a)(2) provides alternative grounds for affirming the appointment of a trustee. Both steps in this syllogism lack merit. First, Cajun unquestionably contested the appointment of a trustee under § 1104(a)(2) in both the District Court and the Court of Appeals, and intends to do so if it becomes an issue in this proceeding; therefore, it is simply inaccurate to state that the District Court's ruling on this point has not been "challenged." Second, the United States admits that only the District Court, and not the Fifth Circuit, relied on § 1104(a)(2) in making its decision; therefore, Cajun is unable to understand how § 1104(a)(2) could provide alternative grounds for the Fifth

Circuit's opinion or how Cajun's failure to appeal the Fifth Circuit's "nonruling" on this issue to this Court could constitute a decision not to challenge the District Court's holding. As the Fifth Circuit did not rely on § 1104(a)(2), it is not properly before this Court and cannot provide an alternative basis for affirming the appointment of a trustee. If this Court nonetheless wishes to address the issue of whether the appointment of a trustee was warranted under § 1104(a)(2) as well, Cajun will be happy to brief the issue at the Court's request.

This 12th day of July, 1996.

Respectfully submitted,

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